Office-Supreme Court, U.S.
FILED
OCT 31 196
JOHN F. DAVIS, CLERK

No. 103

In the

Supreme Court of the United States

OCTOBER TERM, 1962

MYRPH JOHNSON,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING

T. K. IRWIN, JR.,
IRWIN AND IRWIN, *Attorneys,*
215 Mercantile Continental Building,
Dallas, Texas, RI 1-1411,
Attorneys for Petitioner.

WARLICK PRESS, INC.—2263 VALDINA STREET—DALLAS—ME 1-3130

No. 103

In the

Supreme Court of the United States

OCTOBER TERM, 1962

MYRPH JOHNSON,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING

Petitioner respectfully moves for leave to file the annexed petition for rehearing of the order of this Court denying the petition for writ of certiorari in this case, entered on October 8, 1962. Rehearing is sought at this time because, as more fully pointed out in the annexed petition, Petitioner is being deprived of his property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

A *real* opportunity for a hearing was denied Petitioner. Such opportunity is one of the essential elements of due process. One of the maxims of the Common Law was that

"no man should be punished without an opportunity of being heard." *Hovey v. Elliott, 167 U. S. 409, 42 L. Ed. 215.* Hence, no one may be legally divested of his property without a hearing in which he may contest any claim made against him, and be allowed to meet it with the law and the facts, and to show if he can that such claim is unfounded.

The hearing held in this case, principally during Petitioner's *involuntary* absence, was not a hearing held in accordance with due process of law. There is no hearing when a party does not know what evidence is offered or considered, and is given no *real* opportunity to test, explain or refute the same. *Interstate Commerce Commission v. Louisville & N.R. Co., 227 U. S. 88, 57 L. Ed. 431.*

This petition for rehearing is duly filed within the time permitted by the Rules of this Court.

Respectfully submitted,

T. K. IRWIN, JR.,
IRWIN AND IRWIN, *Attorneys,*
215 Mercantile Continental Building,
Dallas, Texas, RI 1-1411,
Attorneys for Petitioner.

By: T. K. Irwin Jr.

No. 103

In the

Supreme Court of the United States

OCTOBER TERM, 1962

MYRPH JOHNSON,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner prays that this Court grant rehearing of its order of October 8, 1962, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Criminal Appeals of the State of Texas in the above entitled case as prayed for in the petition filed May 4, 1962, and being No. 936, October Term, 1961.

At the time for filing of the petition for writ of certiorari in this cause, Petitioner did not clearly and distinctly bring to the attention of the Court that the conduct of the State Judiciary in this case denied Petitioner his existing remedy for the enforcement of a right without being afforded a

real opportunity to protect such right. Petitioner is aware that granting this petition for rehearing under these circimstances is a rare exception. *Hickman v. Taylor, 327 U. S. 808, 328 U. S. 876, 329 U. S. 495; Brinkerhoff-Faris Trust Co. v. Hill, 280 U. S. 604, 550, 281 U. S. 673;* see also Page 330 *Supreme Court Practice* by Robert L. Stern and Eugene Gressman.

Petitioner has adjudged against him a bond forefeiture without being accorded a "hearing" in accordance with due process of law. He was in Court only during part of the hearing and was, by direct order of the Court, removed therefrom before its conclusion, and without being advised of his rights, or even advised that he was a "party" to the proceedings.

Petitioner herein failed to call to the attention of this Court that the Bond Forfeiture Statutes of Texas fall into THREE classifications insofar as relief from a judgment nisi of forfeiture is concerned. Article 436, Code of Criminal Procedure of the State of Texas, deals with *EXONERATION*, and is applicable whether the principal appears or not. Article 439, Code of Criminal Procedure of the State of Texas, deals with the *discretion* of the Trial Court to remit the whole or part of the bond when the principal appears before final judgment of forfeiture, but *before he is tried* for the offense for which the bond was made. *Article 440*, Code of Criminal Procedure of the State of Texas, deals with the Principal's *RIGHT* to have the forfeiture set aside when he appears before the entry of final judgment and is *TRIED* for the offense for which the bond was made.

The Petitioner in this case falls within the provisions of Article 440, supra, in that he appeared and *was tried*, before final judgment of forfeiture was entered. This is the exact fact situation which led the Supreme Court of Texas, in *Burgemeister v. Anderson, 259 S. W. 1078*, to hold that Burgemeister was a "party" to all of the proceedings and "By the judgment nisi the Court acquires jurisdiction to adjudicate the matter of enforcing the Principal's obligation to the State, as well as that of the sureties, and, on the Principal's appearance and tender of issues excusing his failure to appear at the time of forfeiture, *the statutes entitle him to both a hearing and a determination* as to whether the judgment nisi shall be vacated in whole or in part or shall be made final."

Petitioner says that his involuntary removal from the courtroom before the conclusion of the "hearing", without being notified that he was a "party" to the proceedings, and without being advised that he was entitled to a full hearing in which he was allowed to make, by evidence and argument, a showing fairly adequate to show the impropriety of the action taken, was not a hearing in accordance with due process of law.

JUSTICE BRANDEIS in *Brinkerhoff-Faris Trust Co. v. Hill, 280 U. S. 604, 550; 281 U. S. 673*, states Petitioner's contention in words that Petitioner cannot hope to match: "Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing reme-

dies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

The Trial Court in holding the hearing, principally during Petitioner's involuntary absence, and without advising him of his rights, or that he was even a party to the proceedings, failed to accord Petitioner due process of law.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari it is respectfully urged that rehearing be granted and, that, upon such rehearing, that a writ of certiorari issue to the Court of Criminal Appeals of the State of Texas.

Respectfully submitted,

T. K. IRWIN, JR.,
IRWIN AND IRWIN, *Attorneys*,
215 Mercantile Continental Building,
Dallas, Texas, RI 1-1411,
Attorneys for Petitioner.

By: T. K. Irwin Jr.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is prepared in good faith and not for delay and in counsel's opinion is restricted to the grounds specified in the rules of this Court.

T. K. IRWIN, JR.,
Attorney for Petitioner.

I hereby certify that a copy of the foregoing petition for rehearing was deposited in the United States mail properly addressed and stamped to the Attorney General of the State of Texas.

T. K. IRWIN, JR.,
Attorney for Petitioner.